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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

HH, LLC et al.,

Plaintiffs, Cross-defendants and  
Appellants,

v.

WESTLB AG,

Defendant, Cross-complainant and  
Respondent.

D060531

(Super. Ct. No. 73-2009-  
00104923-CU-CO-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Randa  
Trapp, Judge. Affirmed.

Appellants and cross-defendants HH, LLC (HH) and Maureen and Mavourneen  
O'Connor (O'Connor sisters) appeal an order denying their special motion to strike the  
cross-complaint of respondent WestLB AG (WestLB), a German banking corporation,

pursuant to Code of Civil Procedure<sup>1</sup> section 425.16, commonly known as the anti-SLAPP (strategic lawsuit against public participation) statute. Appellants owned and operated the Heritage House hotel. Appellants sold the property to Lantana Mendocino LLC (Lantana). Under an inter creditor agreement (ICA), WestLB provided senior financing in the amount of \$19.5 million secured by a deed of trust. HH later received a \$7 million promissory note from Lantana secured by a subordinate deed of trust. Lantana defaulted, and WestLB foreclosed on the property and purchased it at a trustee's sale.

Appellants sued WestLB for fraud and other causes of action. WestLB cross-complained against HH for breach of the ICA, and against the O'Connor sisters premised on alter ego liability. In denying appellants' ensuing anti-SLAPP motion, the court ruled WestLB's cross-complaint did not arise from appellants' protected activity.

Appellants contend on appeal that WestLB's cross-complaint aimed to punish them for exercising their First Amendment right to petition the court. WestLB counters that appellants have forfeited their appellate claims because their opening brief fails to demonstrate reversible error. WestLB alternatively contends appellants did not meet their burden of showing they satisfied the "arising from" prong of the anti-SLAPP statute. Finally, WestLB asserts it can satisfy the second prong of the statute by demonstrating a probability of prevailing on the merits of its cross-complaint. We conclude appellants did not satisfy the "arising from" prong of the anti-SLAPP statute and we affirm the judgment. Accordingly, we need not address other issues in the appeal.

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<sup>1</sup> All statutory references are to the Code of Civil Procedure unless otherwise specified.

## BACKGROUND

The ICA states that in January 2004, HH entered into a purchase and sale agreement to sell Heritage House property to Lantana. Financing was not secured until August 2005 when WestLB, as senior lender, loaned Lantana \$19,500,000 to complete the purchase, which was secured by a senior deed of trust to Heritage House. HH later received a \$7 million promissory note from Lantana which was secured by a subordinate deed of trust on the Heritage House property.

In the ICA, HH and WestLB made representations and warranties including that HH, as subordinate lender, "hereby acknowledges that (i) it has received and reviewed, and, subject to the terms and conditions of [the ICA], hereby consents to and approves of the making of the senior loan and, subject to the terms and provisions of [the ICA], all of the terms and provisions of the senior loan documents." In section 10(a) of the ICA, HH and WestLB agreed that neither one of them owed the other any fiduciary duty in connection with the administration of the loan and loan documents, and they would not assert any such claims against each other. West and HH also made mutual disclaimers in section 31 of the ICA.<sup>2</sup> (Some capitalization omitted.)

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<sup>2</sup> Section 31(a) of the ICA states: "[WestLB] and [HH] are sophisticated lenders and/or investors in real estate and their respective decision to enter into the senior loan and the subordinate loan is based upon their own independent expert evaluation of the terms, covenants, conditions, and provisions of, respectively, the senior loan documents and the subordinate loan documents and such other matters, materials and market conditions and criteria which [WestLB] and [HH] deem relevant. [WestLB] and [HH] [have] not relied in entering into this agreement, and respectively, the senior loan, the senior loan documents, the subordinate loan or the subordinate loan documents, upon any oral or written information, representation, warranty or covenant from the other, or any of

In August 2007, WestLB and Lantana ratified the ICA in a "global settlement and forbearance agreement," pursuant to which WestLB loaned Lantana \$4.5 million, which was added to the senior note, in exchange for Lantana dismissing with prejudice its federal lawsuit against WestLB. HH executed a consent to the global settlement, which affirmed that WestLB's security interest was valid and "in first priority." The global settlement agreement further states that HH "(a) agrees that the [ICA] remains and shall continue in full force and effect and is valid and enforceable; (b) ratifies, affirms, and confirms the [ICA] and all of its respective duties and obligations thereunder."

In the operative third amended complaint, appellants alleged causes of action for fraud, violation of Business and Professions Code section 17200, breach of covenant of good faith, negligent misrepresentation, breach of obligation to pay money against borrower, promissory estoppel and waste against WestLB, Lantana W. Holdings, Lantana, Heritage House Resort, Inc. and various individuals.

Appellants further alleged in the complaint: "WestLB owed [appellants] an independent duty to be truthful because (1) WestLB knew it was engaging in

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the other's representatives, employees, affiliates or agents other than the representations and warranties of the other contained herein. [WestLB] and [HH] further acknowledge[ ] no employee, agent or representative of the other has been authorized to make, and that [WestLB] and [HH] have not relied upon, any statements, representations, warranties or covenants other than those specifically contained in this [a]greement. Without limiting the foregoing, [WestLB] and [HH] acknowledge[ ] that the other has made no representations or warranties as to the senior loan or the subordinate loan or the premises (including, without limitation, the cash flow of the [p]remises, the value, marketability, condition or future performance thereof, the existence, status, adequacy or sufficiency of the leases, the tenancies or occupancies of the [p]remises, or the sufficiency of the cash flow of the premises, to pay all amounts which may become due from time to time pursuant to the senior loan or the subordinate loan.)" (Some capitalization omitted.)

transaction[s] it intended to effect and did effect [*sic*] [appellants]. WestLB induced the O'Connor sisters to transfer title to Heritage House to Lantana Mendocino based on WestLB's and its co-conspirators [*sic*] material misrepresentations. WestLB positioned itself to take title to the property clear of any [HH] security interest in Heritage House when the natural and probable consequences of the fraud took effect. WestLB so positioned itself by inducing [appellants] to subordinate [HH's] trust deed securing the payment of the \$7 million promissory note to WestLB's Heritage House trust deed securing the payment of WestLB's \$19.5 million trust deed." Appellants claim WestLB formed a separate company, Lantana W. Holdings, LLC, to operate and hold the Heritage House following the foreclosure. In the prayer for relief, HH seeks to recover for itself the title to Heritage House from Lantana W. Holdings, LLC.

WestLB cross-complained, alleging HH had breached the ICA, and the O'Connor sisters were liable on an "alter ego" cause of action. Specifically, WestLB alleged that "[t]he corporate distinctions between the O'Connor sisters and HH should be disregarded because HH was operated as a mere tool or business conduit of the O'Connor sisters and maintenance of the corporate form is being used to evade legal obligations owed to WestLB."

WestLB asserts in the cross-complaint: "In total, HH has received approximately \$15,000,000 from Lantana via WestLB in connection with the sale of the Heritage House property. Conversely, WestLB has incurred costs and expenses in excess of \$24,000,000 in connection with the Heritage House property. Following a series of defaults by Lantana and HH's express statement, made no later than February 1, 2008, that HH was

not going to exercise its purchase option under the ICA, WestLB foreclosed on the property in December 2008."

In the cross-complaint, WestLB counters HH's fraud claims by pointing out contradictions between HH's representations made in the ICA and HH's allegations made in the third amended complaint, and WestLB concludes: "Should HH successfully establish the allegations in its [t]hird [a]mended [c]omplaint, HH will have necessarily breached the ICA at the time it was executed. Among other things, HH's breaches of the ICA would include the following contradictions of the representations and warranties made therein: [¶] (a) HH did not independently and without reliance on WestLB make its own credit analysis and decision to enter into the ICA and instead relied on WestLB; [¶] (b) HH did not assume all responsibility for keeping itself informed as to the condition (financial or otherwise) of the Heritage House property and instead relied on WestLB; [¶] (c) WestLB owed it a fiduciary duty in connection with the administration of WestLB's senior loan despite agreeing not to assert any such claim against WestLB; [¶] (d) HH was not a sophisticated lender and/or investor in real estate; [¶] (e) HH's decision to enter into the [s]ubordinate [l]oan was not based on its own independent evaluation of the terms, covenants, conditions, and provisions of the [s]ubordinate [l]oan Documents and such other matters, materials and market conditions and criteria which it deemed relevant; and, instead relied on WestLB; [¶] (f) [i]n entering into the ICA, HH relied on the [s]enior [l]oan [d]ocuments and oral or written information, representation, warranty or covenant from WestLB and/or its representatives, employees, [a]ffiliates or agents other than the representations and warranties in the ICA[.] [¶] . . . WestLB

alleges that each of the foregoing contentions made are express violations of the ICA and are false."

WestLB also states in its cross-complaint that if the trier of fact agrees that HH had breached the ICA, then under section 29 of the ICA, HH will have to reimburse WestLB for expenses incurred in the litigation, including attorney fees and any damages awarded against WestLB based on HH's breach of contract.<sup>3</sup>

Appellants filed a special motion to strike under section 425.16, arguing that WestLB's cross-complaint arose in retaliation for HH suing WestLB. Appellants argued that WestLB's cross-complaint relied on faulty legal reasoning, and overlooked that if HH prevailed on its fraud cause of action, the ICA would be voidable. Appellants requested the court take judicial notice of previous filings in the action, including their third amended complaint and WestLB's cross-complaint.

WestLB opposed the motion to strike, contending its cross-complaint did not arise out of appellants' protected activity, but rather it was compulsory under section 426.10, and based on HH's misrepresentations made when HH entered into the ICA. Specifically, WestLB argued, "[T]he same transaction or series of transactions—the purchase of the Heritage House funded by WestLB's [s]enior [l]oan and the later settlement of the

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<sup>3</sup> Section 29 of the ICA states: "To the extent not paid by the Borrower or out of or from any collateral securing the [s]enior [l]oan which is realized by [WestLB], [HH] agrees upon demand to pay to [WestLB] the amount of any and all reasonable expenses, including, without limitation, the reasonable fees and expenses of its counsel and of any experts or agents, which [WestLB] may incur in connection with the (a) exercise or enforcement of any of the rights of [WestLB] against [HH] hereunder or (b) failure by [HH] to perform or observe any of the provisions hereof."

Lantana lawsuit against WestLB—gave rise to both the complaint and the [c]ross-complaint. The filing of the [c]ross-complaint did not arise from the complaint; rather, the filing of the complaint merely evidenced HH's misrepresentations in the ICA and in its consent to the [g]lobal [s]ettlement and [f]orbearance [a]greement." WestLB noted that despite appellants' contention in the anti-SLAPP motion that the ICA was voidable, the court had granted WestLB's motion to strike appellants' rescission cause of action.

The court found that appellants had not established their initial burden of showing WestLB's claims arose from appellants' conduct constituting protected petitioning activity. Rather, it found the gravamen of WestLB's claim was that appellants had breached the ICA: "The allegations in the cross-complaint arise out of the same transaction or occurrence as HH's claims in the complaint so the cross-complaint is compulsory. [Citations.] Both the third amended complaint and cross-complaint arise from the purchase and sale of the Heritage House and concern the ICA entered into between HH and WestLB." The court therefore concluded that the burden never shifted to WestLB to show a probability of prevailing on the merits of its cross-complaint claims.<sup>4</sup> (Some capitalization omitted.)

## DISCUSSION

### I. *Section 425.16 Legal Principles and Standard of Review*

"A special motion to strike is a procedural remedy to dispose of lawsuits brought to chill the valid exercise of a party's constitutional right of petition or free speech.

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<sup>4</sup> Separately, the trial court overruled appellants' demurrer to WestLB's cross-complaint.



[Citation.] The purpose of the anti-SLAPP statute is to encourage participation in matters of public significance and prevent meritless litigation designed to chill the exercise of First Amendment rights. [Citation.] The Legislature has declared that the statute must be 'construed broadly' to that end." (*Fremont Reorganizing Corp. v Faigin* (2011) 198 Cal.App.4th 1153, 1165.)

Under section 425.16, subdivision (b)(1), a cause of action is subject to a special motion to strike if the cause of action arises from any act of the defendant in furtherance of the defendant's constitutional right of petition or free speech in connection with a public issue, unless the court determines the plaintiff establishes a probability of prevailing on the claim. (§ 425.16, subd. (b)(1).)

"The analysis of an anti-SLAPP motion . . . involves two steps. 'First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one "arising from" protected activity.' " (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 819.) The mere fact an action is filed after protected activity takes place, or that the cause of action arguably may have been " 'triggered' " by protected activity, does not mean the action arose from that activity within the meaning of section 425.16. (*Episcopal Church Cases* (2009) 45 Cal.4th 467, 477.) " 'In the anti-SLAPP context, the critical consideration is whether the cause of action is *based on* the defendant's protected free speech or petitioning activity.' " (*Ibid.*; see *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78 (*Cotati*) ["defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech"].) The court looks to " 'the gravamen or principal thrust' of the action."

(*Episcopal Church Cases*, *supra*, 45 Cal.4th at pp. 477-478, citing *Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 193.) "We assess the principal thrust by identifying '[t]he allegedly wrongful and injury-producing conduct . . . that provides the foundation for the claim.' " (*Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1272.) The fact that "protected activity may lurk in the background—and may explain why the rift between the parties arose in the first place—does not transform a . . . dispute into a SLAPP suit." (*Episcopal Church Cases*, at p. 478.)

" 'If the court finds [the threshold] showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim.' [Citation.] 'Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.' " (*Oasis West Realty, LLC v. Goldman*, *supra*, 51 Cal.4th at pp. 819-820.)

"We review an order granting or denying a motion to strike under section 425.16 *de novo*." (*Oasis West Realty, LLC v. Goldman*, *supra*, 51 Cal.4th at p. 820.) " 'We consider "the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based." [Citation.] However, we neither "weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law." ' " (*Freeman v. Schack* (2007) 154 Cal.App.4th 719, 727, quoting *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.)

## II. Section 425.16's "Arising From" Prong

When a cause of action arises from the cross-defendant's contract performance and not from acts in furtherance of the right of petition or free speech, an anti-SLAPP motion should be denied. (*Ericsson GE Mobile Communications, Inc. v. C.S.I. Telecommunications Engineers* (1996) 49 Cal.App.4th 1591, 1594, 1601-1602, disapproved of on other grounds in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5.)

"[A] claim filed in response to, or in retaliation for, threatened or actual litigation is not subject to the anti-SLAPP statute simply because it may be viewed as an oppressive litigation tactic. [Citation.] That a cause of action arguably may have been triggered by protected activity does not entail that it is one arising from such. To focus on [plaintiff's or cross-complainant's] litigation tactics, rather than on the substance of [a] lawsuit, risks allowing [defendant or cross-defendant] to circumvent the showing expressly required by section 425.16, subdivision (b)(1) that an alleged SLAPP *arise from* protected speech or petitioning." (*Cotati, supra*, 29 Cal.4th at p. 78, citing *Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 924, 933, fn. 7 (*Kajima*).)

In *Kajima*, the plaintiff sued the city for payment on a reconstruction project, and the city cross-complained for breach of contract and numerous other causes of action. The court held the anti-SLAPP statute was inapplicable to all but one of the cross-

complainant's causes of action because they arose from the cross-defendant's bidding and contracting practices, which predated the filing of the complaint, and not from acts in furtherance of cross-defendant's right of petition. (*Kajima, supra*, 95 Cal.App.4th at pp. 929-930.) The court rejected the cross-defendant's contention the cross-complaint was subject to a motion to strike because it was a retaliatory and oppressive litigation tactic. The court explained that "[i]f a cross-defendant believes that a cross-complaint has been filed 'for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation,' or that the claims against it are frivolous or lacking in evidentiary support, then it may move for sanctions, including attorney fees and other expenses, to be awarded in the trial court's discretion. [Citation.] The anti-SLAPP statute, however, is not the appropriate remedy." (*Kajima, supra*, 95 Cal.App.4th at p. 934.)

### III. Analysis

We elect to address appellants' anti-SLAPP motion on the merits, thus obviating a discussion of WestLB's contention that appellants forfeited their claim by filing a deficient opening brief. Appellants contend they satisfied section 425.16's first prong of showing that WestLB's cross-complaint arose out of their protected activity based on this allegation in the cross-complaint: "Should HH successfully establish the allegations in its Third Amended Complaint, HH will have necessarily breached the ICA at the time it was executed."

From that quoted statement, we conclude that the gravamen of WestLB's claim is that appellants breached the ICA, which expressly required them to conduct their own

independent review of the loan terms and documents, and not rely on WestLB's representations. Restated, WestLB's argument in the cross-complaint is that, as a logical matter, it cannot be simultaneously true that WestLB made numerous alleged misrepresentations to appellants, and that appellants complied with ICA provisions requiring them to independently review the loan terms instead of merely relying on WestLB's representations. Therefore, the logic continues, on the one hand, if appellants had reviewed the loan terms as required, WestLB could not have mislead or fraudulently induced them; and on the other hand, if appellants had failed to review the loan terms, that means they failed to comply with the ICA. WestLB concludes that in either case, and as a legal matter, if appellants prevail on their claims of fraud and misrepresentation, such success will only be possible because appellants breached the ICA, and WestLB will be entitled to attorney fees under the ICA.

We need not decide the merits of that argument in WestLB's cross-complaint. We conclude that the primary thrust of WestLB's cross-complaint is that HH breached its representations made in the ICA; therefore, we do not construe WestLB's cross-complaint as in any way "arising from" appellants' third amended complaint under section 425.16. Although WestLB's cross-complaint may be related to appellants' third amended complaint, that fact alone does not suffice to strike the cross-complaint under section 425.16. "If the core injury-producing conduct upon which plaintiff's claim is premised does not rest on protected speech or petitioning activity, collateral or incidental allusions to protected activity will not trigger application of the anti-SLAPP statute." (*Hylton v. Frank E. Rogozienski, Inc.*, *supra*, 177 Cal.App.4th at p. 1272.)

Appellants also attack WestLB's litigation strategy of claiming it is entitled to attorney fees. Appellants assert that it is for the trial court to decide any attorney fee award based on its determination of the prevailing party; therefore, WestLB's claimed entitlement to such fees under the ICA "was part of WestLB's strategy to intimidate [appellants] for exercising their constitutional rights and access to courts." Separately, appellants claim in their opening brief that "[a]t the heart of WestLB's strategic motion was the heavy-handed act of naming the O'Connor sisters personally." Appellants continue: "After WestLB had been successful in removing the O'Connor sisters as plaintiffs, it cruelly and without legal justification named them in a cross-complaint under an alleged alter ego theory;" therefore, such action "was an even more egregious example of such tactics prohibited under the [a]nti-SLAPP jurisprudence." We decline appellants' invitation to focus on WestLB's litigation tactics rather than the substance of WestLB's cross-complaint; instead, as instructed by the California Supreme Court, we analyze whether appellants satisfied section 425.16's first prong. We conclude they did not. (*Cotati, supra*, 29 Cal.4th at p. 78.) Accordingly, the burden never shifted to WestLB to show a likelihood of prevailing on the merits of its cross-complaint, and the court did not err in denying appellants' motion to strike the causes of action in WestLB's cross-complaint.

DISPOSITION

The judgment is affirmed. WestLB AG is awarded costs on appeal.

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O'ROURKE, J.

WE CONCUR:

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BENKE, Acting P. J.

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AARON, J.